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ATTORNEY FOR APPELLANT:

**NANCY A. McCASLIN**  
McCaslin & McCaslin  
Elkhart, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**KARL M. SCHARNBERG**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL A. DERSCH,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 20A03-0709-CR-424

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable George W. Biddlecome, Judge  
Cause No. 20D03-0610-FB-54

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**May 8, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant-Defendant Michael A. Dersch appeals from his convictions for Class D felony Sexual Battery<sup>1</sup> and Class B felony Criminal Deviate Conduct.<sup>2</sup> Dersch contends that the trial court abused its discretion in instructing the jury regarding the concept of reasonable doubt and that his convictions violate Indiana constitutional prohibitions against double jeopardy. We affirm.

### **FACTS**

When she was a freshman in high school, R.M. had dated junior Michael Dersch for approximately two weeks before ending the relationship at her parents' urging. On the morning of October 1, 2006, R.M., who was now seventeen years old, attended a baptism and then drove to the West Side Park in Nappanee. R.M. spoke with Dersch by telephone at approximately 1:00 p.m. and told him that she would be at the park.

Shortly after arriving at the park, R.M. was swinging by herself when Dersch pushed her out of the swing from behind. Dersch then took hold of R.M. and moved her to the side of a nearby building, where he pinned her against a wall with his forearm across her upper chest. Dersch fondled R.M.'s breasts over her clothing for approximately two minutes, and his response to R.M.'s repeated pleas to stop was that she would enjoy what he was going to do to her. While still pinning R.M. to the wall, Dersch then put his hand down the front of R.M.'s pants and inserted his finger into her vagina. When Dersch removed his hand and attempted to reach down the back of R.M.'s pants, he lost his balance, and R.M. managed to free herself, ran to her nearby car, and drove off.

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<sup>1</sup> Ind. Code § 35-42-4-8 (2006).

<sup>2</sup> Ind. Code § 35-42-4-2(a)(1) (2006).

On October 23, 2006, the State charged Dersch with Class B felony criminal deviate conduct and Class D felony sexual battery stemming from the incident with R.M. and two unrelated counts of Class D felony sexual battery. After the presentation of evidence at Dersch's trial on the counts stemming from the incident with R.M., the trial court instructed the jury, *inter alia*, that

[t]he State of Indiana has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you should find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you should give him the benefit of the doubt and find him not guilty.

Appellant's App. p. 173. The jury found Dersch guilty of Class B felony criminal deviate conduct and Class D felony sexual battery. After his trial, Dersch and the State entered into a written agreement providing that he would receive a twenty-year executed sentence for the crimes he committed against R.M. and that, in return, the State would dismiss the remaining two Class D felony sexual battery charges. The trial court accepted the sentencing agreement and sentenced Dersch to twenty years of incarceration for criminal deviate conduct and three years for sexual battery, both sentences to be served concurrently.

## DISCUSSION AND DECISION

### **I. Whether the Trial Court's Final Instruction on Reasonable Doubt Constituted Fundamental Error**

Dersch contends that the trial court abused its discretion in instructing the jury on the concept of reasonable doubt by giving it a permissive, rather than mandatory, instruction. Specifically, Dersch contends that the trial court should have instructed the jury that it “must” acquit him if it found a real possibility that he was not guilty as opposed to “should” acquit him, as it did, in fact, instruct the jury. The trial court has broad discretion in the manner of instructing the jury, and we review its decision thereon only for an abuse of that discretion. *Snell v. State*, 866 N.E.2d 392, 395 (Ind. Ct. App. 2007). We review the refusal of a tendered instruction by examining whether (1) the tendered instruction correctly states the law, (2) there is evidence in the record to support giving the instruction, and (3) the substance of the tendered instruction is covered by other given instructions. *Id.* at 395-96. We will not reverse the trial court’s ruling unless the instructions, when taken as a whole, misstate the law or mislead the jury. *Id.* at 396.

Dersch concedes that he did not object to this instruction at trial and to avoid waiver argues that the giving of this instruction is fundamental error. It is well-settled that fundamental error is “error so egregious that reversal of a criminal conviction is required even if no objection to the error is registered at trial.” *Hopkins v. State*, 782 N.E.2d 988, 991 (Ind. 2003). Fundamental error requires prejudice to the defendant. *Id.*

Here, the trial court’s instruction regarding reasonable doubt did not constitute error, much less fundamental error. Although the Indiana Supreme Court has acknowledged that

“the term ‘should’ lacks that absolute quality present in other terms, such as ‘must[,]’” it has nevertheless repeatedly approved of instructions similar to the one at issue here. *Holmes v. State*, 671 N.E.2d 841, 849 (Ind. 1996); *see also Ben-Yisrayl v. State*, 738 N.E.2d 253, 265 (Ind. 2000). Bound, as we are, by Indiana Supreme Court precedent, we likewise conclude that the instruction was proper and did not amount to error, much less fundamental error.

## **II. Whether Dersch’s Convictions Violate Constitutional Prohibitions Against Double Jeopardy**

Dersch contends that his convictions violate Indiana constitutional prohibitions against double jeopardy because they were established by the same evidentiary facts. In *Richardson v. State*, 717 N.E.2d 32, (Ind.1999), the Indiana Supreme Court held “that two or more offenses are the ‘same offense’ in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to ... the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” *Id.* at 49-50. The *Richardson* court stated the actual evidence test as follows:

To show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

*Id.* at 53. The Indiana Supreme Court has also explained that, when applying the actual evidence test, the question

is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish *one* of the essential elements of a second challenged offense. In other words, under the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one

offense also establish only one or even several, but not all, of the essential elements of a second offense.

*Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002). In determining what evidence the trier of fact used to establish the essential elements of an offense, “we consider the evidence, charging information, final jury instructions ... and arguments of counsel.” *Rutherford v. State*, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007).

Dersch’s argument in this regard is based on his assertion that “the evidence of conduct presented by the state was that Dersch grabbed R.M. off the swing, forcibly escorted her to the north side of the pavilion building, pushed her up against the building, put his hand down her pants and penetrated her vagina with his finger.” Appellant’s Br. p. 18. Dersch’s argument, then, is that the vaginal penetration, in addition to supporting his criminal deviate behavior conviction, was the touching that supported the sexual battery conviction as well. We might be inclined to accept this argument if Dersch’s vaginal penetration was the only touching of R.M. that could arguably have been done “with intent to arouse or satisfy [Dersch’s] sexual desires or the sexual desires of [R.M.]” Ind. Code § 35-42-4-8. Dersch’s characterization of the record, however, is not accurate.

In fact, the State presented evidence that Dersch, after pinning R.M. against a wall, fondled her breasts for approximately two minutes, and *then* reached down her pants and penetrated her vagina with his finger. In other words, R.M. described two distinct touchings. Moreover, the specific criminal deviate conduct the State charged Dersch with was inserting his finger into R.M.’s vagina. It follows that the fondling of R.M.’s breasts, as the only other touching that was of a sexual nature, was the basis of the separate sexual battery charge.

Finally, although the State never specifically argued that the breast fondling constituted sexual battery, it did emphasize that it and the vaginal insertion were distinct acts. This emphasis also supports the conclusion that the jury relied on the two different acts to support the two charges. We conclude that Dersch has established no reasonable possibility that the jury relied on evidence that Dersch inserted his finger into R.M.'s vagina to support its guilty verdicts for both sexual battery and criminal deviate conduct. Dersch's convictions therefore do not violate prohibitions against double jeopardy.

### **III. Sentence**

Dersch's contention in this regard is that his convictions violate prohibitions against double jeopardy and that, in light of the alleged invalidity of his sexual battery conviction, this cause must therefore be remanded for resentencing. The State counters that, pursuant to the written agreement he signed before sentencing, Dersch may not challenge his sentence on direct appeal. We need not address the merits of either argument, however, as we have concluded that Dersch's convictions do not violate Indiana constitutional prohibitions against double jeopardy.

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.